

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of )  
WESTEL SAMOA, INC. )  
For Broadband Block C Personal )  
Communications Systems Facilities )  
and )  
WESTEL, L.P. )  
For Broadband Block F Personal )  
Communications Systems Facilities )  
To: Honorable Arthur I. Steinberg  
Administrative Law Judge

WT Docket No. 97-199

OPPOSITION TO PETITION TO INTERVENE

WESTEL SAMOA, INC.  
WESTEL, L.P.  
QUENTIN L. BREEN

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#### SUMMARY

The Presiding Judge should deny the Petition to Intervene of Clearcomm, L.P., because Clearcomm does not have any cognizable interest upon which party-in-interest status might be based; the interest claimed by Clearcomm does not fall within the zone of interests to be protected by the Commission; there has been no demonstration that Clearcomm's intervention would enhance the development of a complete and accurate record; and allowing Clearcomm to intervene at this time would substantially and unfairly delay resolution of this proceeding.

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 <b>To: Honorable Arthur I. Steinberg</b>		
<b>Administrative Law Judge</b>		

**OPPOSITION TO PETITION TO INTERVENE**

Westel Samoa, Inc. ("WSI"), Westel, L.P. ("WLP") and Quentin L. Breen ("Mr. Breen") (WSI, WLP and Mr. Breen collectively the "Westel Parties"), by their attorneys and pursuant to Section 1.223 of the Commission's Rules, hereby oppose the November 13, 1997 "Petition to Intervene" filed in the instant proceeding by ClearComm, L.P. ("ClearComm").<sup>1</sup> For their opposition, the Westel Parties state as follows:

**Procedural Posture**

As an initial matter, it must be noted that ClearComm did not participate in any earlier proceedings regarding the WSI or

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<sup>1</sup> Clearcomm previously was known as PCS 2000, L.P. This pleading adopts the Petition's convention of referring to that entity as Clearcomm, regardless of its name at a specific time.

WLP applications which are the subjects of the instant hearing.<sup>2</sup> Although ClearComm had ample notice of the full significance of the subject applications, it did not file any petition or comment with regard to those applications.<sup>3</sup> Having failed to participate in, and thereby contribute to, the prehearing review and processing of the subject applications, ClearComm should not be allowed to freely intervene at this stage of the proceeding. If ClearComm had any interest in the subject applications, or if it could have contributed to the Commission's early resolution of issues attendant with the subject applications (and thereby possibly obviate the need for any hearing) it should have sought to participate in response to the Commission's earliest public notices regarding the subject applications.<sup>4</sup>

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<sup>2</sup> While acknowledging that Clearcomm's November 13, 1997 Petition was filed within the time afforded by the Rules for seeking intervention, albeit at the eleventh hour, the Westel Parties are constrained to point out that (i) publication of the hearing designation order in the Federal Register was delayed inordinately (not occurring until October 15, 1997, the date of the prehearing conference in this proceeding and a date more than one month after the Commission's release of the hearing designation order); (ii) Clearcomm was procedurally able to seek intervention any time after the Commission's September 9, 1997 release of the hearing designation order; and (iii) Clearcomm has long been aware of the relatively accelerated procedural schedule in this proceeding (counsel for Clearcomm having been observers at the prehearing conference).

<sup>3</sup> PCS 2000, L.P. ("NAL"), 12 FCC Rcd 1703, at ¶ 50 (1997) (Mr. Breen's character qualifications are to be examined in the context of the WSI and WLP applications, not in the context of Clearcomm's applications).

<sup>4</sup> In this regard, it should be noted that Clearcomm does not suggest that it now has interests or information that it did not have during earlier application processing stages.

ClearComm Has No Cognizable Interest In This Proceeding

To intervene herein as a matter of right, ClearComm must demonstrate that it has a cognizable interest in this proceeding. See, 47 U.S.C. § 309(e). Intervention under section 1.223(a) of the Commission's rules is available only to a "person who qualifies as a party in interest." To now qualify as a party in interest, ClearComm must show (1) injury in fact that is both (2) fairly traceable to the challenged action and (3) likely to be redressed by the relief requested.<sup>5</sup>

To meet that test, ClearComm first is required to demonstrate that the disposition of this case would cause it "injury of a direct, tangible or substantial nature."<sup>6</sup> The Westel Parties respectfully submit that there has been no such showing by ClearComm.

ClearComm claims the outcome of the instant proceeding may also affect the outcome of its civil lawsuit against Romulus Telecommunications, Inc. ("Romulus"), a corporation in which Mr. Breen has a beneficial interest. In this regard, ClearComm appears to be concerned that the vindication of Mr. Breen in the instant proceeding may cause Romulus to be relieved of the civil liability ClearComm has asserted against Romulus.

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<sup>5</sup> Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992); JAJ Cellular v. FCC, 54 F.3d 834, 837 n. 5 (D.C. Cir. 1995); Conn-2 RSA Partnership, 9 FCC Rcd 3295, 3297 (1994).

<sup>6</sup> PCS 2000, L.P. ("MO&O"), 12 FCC Rcd 1681, 1692 (1997) (citing Teleprompter Corp., 87 FCC 2d 531, 537 (1989), aff'd, 89 FCC 2d 417 (1982)).

It is well established that standing is accorded to persons not for the protection of their general private interests but only to vindicate the public interest with regard to matters within the zone of interest to be protected by the Commission.<sup>7</sup> The civil claims asserted by ClearComm against Romulus, being based on contract and tort, do not lie within the zone of interests to be protected by the Commission and, therefore, are not appropriate subjects for adjudication by the Commission.<sup>8</sup> Instead, ClearComm's claims are private disputes among private litigants, none of which are parties to this proceeding, and, therefore, ClearComm's civil claims should be left for adjudication by a civil court.<sup>9</sup> Conjecture as to possible impact upon a collateral civil action does not constitute injury in fact which could be fairly traceable to any action in this case. ClearComm, therefore, has failed to establish the requisite "causal nexus" between possible injury in the civil case and the outcome of this case.<sup>10</sup> In sum, because it has not demonstrated it has a tangible economic interest in the outcome

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<sup>7</sup> Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1001 [7 R.R. 2d 2001] (1966). Arizona Mobile Telephone Co., 47 R.R. 2d 1603 (1980).

<sup>8</sup> It also should be noted that Clearcomm's claims in the civil action are asserted against only Romulus and Anthony T. Easton. Mr. Breen is not a named party to that proceeding and, conversely, Romulus and Mr. Easton, who are named parties in the civil action, are, like Clearcomm, not presently parties to the instant proceeding.

<sup>9</sup> MCI Communications Corp., 10 FCC Rcd 1072, 1074 (1994).

<sup>10</sup> MO&O, 12 FCC Rcd at 1692.

of the instant proceeding, ClearComm is not entitled to participate herein as a matter of right.<sup>11</sup>

ClearComm also claims to be concerned that "findings in this case could clearly affect ClearComm's standing before the FCC." The Westel Parties, however, submit that ClearComm's concern are without valid basis. The Commission's decisions in the PCS 2000 proceeding make it clear that ClearComm's qualifications and licenses are not in any way dependent upon the past actions or present qualifications of WSI, WLP or Mr. Breen.<sup>12</sup> In fact, the Commission gave specific notice that it would address the qualifications of Mr. Breen, WSI and WLP in a proceeding separate and independent from any proceedings involving ClearComm's licenses, qualifications or liability for monetary forfeiture.<sup>13</sup>

The Westel Parties submit that the Petition's reliance upon the Palmetto case is misplaced.<sup>14</sup> In Palmetto, the applicant's

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<sup>11</sup> Telephone and Data Systems, Inc., 9 FCC Rcd 2780, 2781 (Rev. Bd., 1994).

<sup>12</sup> MO&O, at ¶ 1 ("Because [Clearcomm] has removed all individuals [presumably including Mr. Breen] who may have been responsible for the misrepresentations from its organization, we conclude that PCS 2000's applications, as amended, may be granted"). NAL, at ¶ 50 (the determination of Clearcomm's qualifications does not require consideration of Mr. Breen's role in the alleged misrepresentations because he has been removed from all control and ownership positions in Clearcomm).

<sup>13</sup> "We will address our concerns regarding Mr. Breen's involvement in PCS 2000's deception in the context where Mr. Breen has an ownership and/or controlling interest in the [WSI and WLP] markets, and make a determination therein of whether Mr. Breen possesses the requisite character qualifications to hold a Commission license." NAL, at ¶ 50.

<sup>14</sup> Palmetto Communications Company, 6 FCC Rcd. 5023 (Rev. Bd. 1991).

interests would have been served by a demonstration that the intervenor lacked the character qualifications required of Commission licensees. Therefore, it was reasonable to expect that the applicant would be attacking the intervenor's qualifications in the context of that proceeding, even though the intervenor was not initially named as a party to the proceeding. It was primarily on the basis of that anomaly that intervention was granted in Palmetto.

No Palmetto-type anomaly is presented by this proceeding. The qualifications and licenses of ClearComm are in no way inconsistent with the vindication sought herein by the Westel Parties. The Westel Parties, therefore, cannot reasonably be anticipated to advance arguments adverse to the interests of ClearComm. Further, the PCS 2000 decisions make it clear that the Commission intended for those decisions to resolve, with finality, all questions regarding ClearComm's qualifications and licenses. Questions regarding Mr. Breen's qualifications, and all questions regarding the licenses sought by WSI and WLP, were relegated by the Commission to this separate and independent proceeding. There is no possibility, therefore, that the resolution of this proceeding, whether favorable or adverse to the interests of the Westel Parties, will have any effect upon the already adjudicated qualifications of, or license grants to, ClearComm.



Participation By ClearComm Will Not  
Contribute To The Resolution Of This Proceeding

ClearComm cannot be granted intervenor status on the basis of the holdings in the West Jersey and Quality cases cited in the Petition.<sup>15</sup> In both of those cases, intervention was granted because the intervenors demonstrated they could offer evidence of "decisional significance". By contrast, the Petition does not offer any particular evidence, much less evidence of "decisional significance". Instead, the Petition claims only that ClearComm, if allowed to intervene, "may well help 'sharpen up the evidence'".<sup>16</sup> That claim falls far short of a demonstration that ClearComm, if granted intervenor status, would, or even could, offer evidence of decisional significance not otherwise available to the present parties.<sup>17</sup>

ClearComm simply has made no showing that its participation as an intervenor in this proceeding would fundamentally assist in the determination of the designated issues. The Petition's claim that ClearComm and its employees may be valuable sources of information, while begging for discovery to be directed to them, fails to demonstrate how ClearComm's active participation as a

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<sup>15</sup> West Jersey Broadcasting Company, 48 R.R. 2d 970 (1980); Quality Broadcasting Corp., 4 R.R. 2d 865 (1965).

<sup>16</sup> Petition, at p. 7.

<sup>17</sup> The Petition proffers the so-called "Independent Counsel's Report" prepared at the behest of Clearcomm. The Westel Parties, at the prehearing conference herein, challenged the probative value of that report, and now must object to the addition of any intervenor which would seek to base any part of its case herein on such unqualified evidence.

party could assist the Commission in the just or efficient resolution of the instant proceeding.<sup>18</sup> In fact, allowing ClearComm to intervene at this time, more than two-and-one-half months after the Commission's release of the hearing designation order herein, would, perforce, occasion delay in the resolution of this proceeding. And any delay would unfairly infringe upon the Westel Parties' fundamental due process rights to the efficient and expeditious resolution of this proceeding.

#### CONCLUSION

The Petition makes it apparent that ClearComm seeks to intervene in the instant proceeding with the objective of supporting its claims in the collateral civil proceeding it instituted against Romulus and Mr. Easton, neither of whom are parties to this proceeding. Standing in Commission proceedings is accorded to persons not for the protection of their general private interests but only to vindicate the public interest with regard to matters within the zone of interest to be protected by the Commission. The civil claims of ClearComm do not fall within the Commission's zone of interest. Further, ClearComm has not demonstrated that granting it intervenor status in the instant

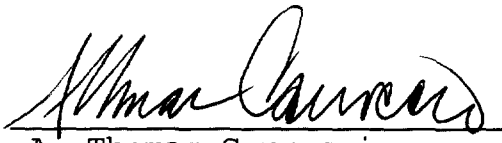
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<sup>18</sup> Patterson B/casting Co., 43 R.R. 2d 266 (1978) (petitioner alleged no new facts or issues; petition to intervene denied); Central Alabama B/casters, Inc., 45 R.R. 2d 1184 (1979) ("It therefore behooves the petitioner to demonstrate how it will assist the Commission . . . . Failing to make such a demonstration, the petition must be denied.")

proceeding would facilitate a just, efficient or timely resolution of this proceeding. Accordingly, the Westel Parties respectfully request that the Presiding Judge deny the Petition.

Respectfully submitted,

WESTEL SAMOA, INC.  
WESTEL, L.P.  
QUENTIN L. BREEN

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November 28, 1997

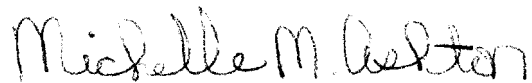
CERTIFICATE OF SERVICE

I, Michelle M. Ashton, a secretary with the law firm of Bell, Boyd & Lloyd, hereby certify that on this 28th day of November, 1997, I have deposited copies of the foregoing "Opposition to Petition to Intervene" in the U. S. Mail, first-class postage prepaid, addressed to each of the following:

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